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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

C.B., Respondent, v. MARK SEAN RITTER, Appellant.	F075343 (Super. Ct. No. 15CEFL06484) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Rosemary T. McGuire, Judge.

Stanley S. Ma for Appellant.

No appearance for Respondent.

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On January 22, 2016, C.B. obtained a permanent domestic violence restraining order against appellant, Mark Sean Ritter. Appellant was not present at the hearing. A year later, appellant filed a motion for an order setting aside the judgment claiming that he was not properly served with notice prior to the hearing, and that the court lacked

[*] Before Franson, Acting P.J., Smith, J. and DeSantos, J.

jurisdiction to order him to complete a 52-week batterer intervention program because that relief was not requested by C.B. We find that the court did not abuse its discretion in determining that appellant was properly served with the domestic violence restraining petition, and therefore affirm the grant of the permanent domestic violence restraining order. However, we strike the portion of the judgment requiring appellant to attend the intervention program.

FACTUAL AND PROCEDURAL BACKGROUND

On November 10, 2015, C.B. filed, and the court granted, a temporary restraining order against appellant. On January 22, 2016, a hearing was held on C.B.'s request for the issuance of a permanent domestic violence restraining order. At the hearing, the family law court determined that although appellant was not present, he was provided proper notice and there was sufficient evidence of past acts of abuse to grant the permanent restraining order. In addition, the court ordered appellant to attend a 52-week batterer intervention program.

A year later, on January 25, 2017, appellant filed a motion for an order setting aside default and default judgment under Code of Civil Procedure sections 473 and 473.5. Appellant attached a declaration in which he stated he was never served nor had any knowledge of the restraining order until November 23, 2016, when another department at the court notified him that he was subject to a restraining order. He further contended that he did not attempt to evade service and that the proof of service filed with the court incorrectly listed the wrong zip code for his address. Finally, he argued that the relief granted exceeded the scope of that requested in that C.B. did not check the box on the domestic violence restraining order form to request appellant attend a 52-week batterer intervention program, but the court ordered him to do so anyway.

C.B. filed an opposition to the motion explaining the hearing on the restraining order was postponed twice as appellant was evading service. C.B. attached as exhibits to her declaration in support of her opposition a copy of an affidavit of unsuccessful service

signed by Fresno County Sherriff's Deputy Cortney Garcia-Porto. In her declaration of diligence, Garcia-Porto described her four attempts to serve appellant. Garcia-Porto called appellant on December 7, 2015, and appellant told her to call him back in 10 minutes to arrange a place to meet. She called back, but he never returned her call. Garcia-Porto attempted service on appellant's residence three more times. She also called appellant after the last attempt at service. He stated that he did not want to meet her and hung up. C.B. then had another individual, Amber Tuller, serve appellant. C.B. attached a copy of the proof of service filed with the court stating that appellant was personally served by Tuller with the restraining order documents on December 29, 2015.

A hearing on the motion to set aside the default was held on February 16, 2017. At the hearing, based on the evidence presented, the court questioned appellant's counsel whether appellant was attempting to evade service and whether he had actually been served as stated in the proof of service. Counsel noted that the individual that served appellant was a friend of C.B., not a professional process server, that the proof of service listed the wrong zip code for appellant's address, and that appellant stated that he was not served in his declaration. In response, C.B. explained that she and two other individuals observed Tuller effectuate service on appellant and offered to provide an audio recording of appellant being served. The court held that there was sufficient evidence to satisfy the court that appellant was served with notice of the hearing. Additionally, despite acknowledging that C.B. did not request appellant attend a batterer's intervention program, the court refused to grant relief to appellant and set aside that requirement.

DISCUSSION

I. STANDARD OF REVIEW

Under Code of Civil Procedure[1] section 473.5, the trial court has discretion to set aside a default and default judgment entered against a party who did not have actual

[1] All further statutory references are to the Code of Civil Procedure unless noted otherwise.

notice in time to defend the action. "Discretionary relief based upon a lack of actual notice under section 473.5 empowers a court to grant relief from a default judgment where a valid service of summons has not resulted in actual notice to a party in time to defend the action." (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1319.)

Section 473.5, subdivision (a) provides, "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or a default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action." Section 473.5, subdivision (c) allows the court to set aside the default judgment if it finds the defendant's lack of actual notice in time to defend was not caused by the defendant's avoidance of service or inexcusable neglect. (*Ellard v. Conway* (2001) 94 Cal.App.4th 540, 547 (*Ellard*).)

"Actual notice is express information of a fact, sometimes referred to as 'genuine knowledge.' (Civ. Code, § 18; see also *Ellard*[, *supra*,] 94 Cal.App.4th 540, 547–548 … ['actual notice' in Code Civ. Proc., § 473.5, which permits a party to set aside a default judgment if a defendant has not been properly served, means 'genuine knowledge'].) (*Sullivan v. Centinela Valley Union High School Dist.* (2011) 194 Cal.App.4th 69, 77.)

"'A motion to vacate a default and set aside [a] judgment [citation] "is addressed to the sound discretion of the trial court, and in the absence of a clear showing of abuse … the exercise of that discretion will not be disturbed on appeal."'" (*Anastos v. Lee*, *supra*, 118 Cal.App.4th at pp. 1318–1319.) "'"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."'" (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1339.) "[W]e defer to the trial court's resolution of any factual conflicts in the declarations." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 940.)

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S SECTION 473.5 MOTION

Appellant contends that the trial court erred in determining that he had actual notice of service despite his assertions in his declaration that he was not served with the restraining order and only discovered its existence at a later court hearing. Appellant also notes that the trial court relied on the proof of service despite it listing the improper zip code for his address.

"In deciding whether service [is] valid, the statutory provisions regarding service of process '"'should be liberally construed to effectuate service and uphold the jurisdiction of the court if actual notice has been received by the defendant.'"' [Citation.] Thus, substantial compliance is sufficient." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1436–1437 (*Dill*).) Where the plaintiff has filed a proof of service, which, on its face, states that the defendant was validly served, "[s]uch proof presumptively establishes the fact of proper service, but it may be impeached and the lack of proper service shown by contradictory evidence." (*M. Lowenstein & Sons, Inc. v. Superior Court* (1978) 80 Cal.App.3d 762, 770, overruled on other grounds in *Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 255, fn. 7; see *Dill*, *supra*, 24 Cal.App.4th at pp. 1441–1442 [filing a proof of service that complies with the statutory requirements creates a rebuttable presumption that service was proper].)

If the proof of service is deficient, the burden shifts to the plaintiff to prove the service was valid. (*Dill*, *supra*, 24 Cal.App.4th at pp. 1442–1443.) "Jurisdiction depends on the fact of service, rather than the proof thereof." (*M. Lowenstein & Sons, Inc. v. Superior Court*, *supra*, 80 Cal.App.3d at p. 770, italics omitted.) Accordingly, a defective affidavit in and of itself will not destroy jurisdiction. (*Ibid.*)

Upon review, we cannot reweigh the trial court's credibility determinations or its evaluation of conflicting evidence. (*Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, 643 ["An appellate court has no power to

reweigh the evidence, or to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn from the evidence."].)

While the trial court held that there was evidence that appellant attempted to evade service, it denied the motion for relief from judgment finding that there was sufficient evidence that appellant was provided actual notice based on being personally served with the restraining order. In addition to providing the proof service, C.B. stated that the personal service of the restraining order was witnessed by herself and two other individuals. In addition to noting that there were witnesses that observed appellant being served, C.B. offered to provide the court an audio recording of appellant being served. In response, appellant flatly denied that he was personally served by Tuller.

The court's determination that appellant was provided actual notice by personal service is supported by the evidence presented by the parties regardless of whether the rebuttable presumption created by filing a proper proof of service applied. The court acknowledged that the zip code listed on the proof of service was incorrect, but noted that the proof of service still indicated that appellant was personally served at the appropriate address. The court took into consideration the competing evidence provided by the parties, including the fact that appellant had evaded service by Deputy Garcia-Porto and that C.B. presented evidence to corroborate that Tuller effectuated personal service on appellant.

After hearing the testimony and reviewing the parties' written materials and exhibits, the trial court was within its discretion to conclude that appellant had actual notice of the restraining order. (*Crescendo Corp. v. Shelted, Inc.* (1968) 267 Cal.App.2d 209, 213 ["'where the evidence is conflicting, the court has a sound discretion to grant or deny the motion [to set aside a default judgment], and in the absence of a clear showing of abuse of discretion, the order will not be interfered with on appeal therefrom'"].) C.B. presented significantly more detailed evidence supporting the fact that appellant was

personally served. Additionally, it would have been reasonable for the trial court to question appellant's credibility that he was not aware he was being served having presented no rebuttal evidence to the fact that he was called several times by Deputy Garcia-Porto in her attempts to effectuate service. In sum, the trial court did not abuse its discretion in determining that service was proper and refusing to vacate the restraining order.

III. SCOPE OF RELIEF AWARDED RELATIVE TO REQUEST FOR RELIEF IN PLEADINGS

Appellant asserts that the judgment of the court exceeded the relief requested in the pleadings. Specifically, C.B. did not check the box on the restraining order form requesting that the court order appellant to attend a 52-week batterer intervention program and show proof of competition to the court.

In addressing appellant's claim, the trial court noted that C.B. did not request that appellant attend the intervention program and inquired whether she would agree to removing the program from the judgment. C.B. was unwilling to remove the program as she felt that appellant's attendance in the program may prevent future violence. Accordingly, the court denied appellant's request.

A body of California cases stand for the proposition that the relief sought by a party cannot exceed that which the defending party has been provided notice. "It is a fundamental concept of due process that a judgment against a defendant cannot be entered unless he was given proper notice and an opportunity to defend. [Citations.] California satisfies these due process requirements in default cases through section 580." (*In re Marriage of Lippel* (1990) 51 Cal.3d 1160, 1166 (*Lippel*).) Section 580, subdivision (a), provides in part: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint …." ""[T]he primary purpose of the section is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them."" (*In re Marriage of Eustice* (2015) 242 Cal.App.4th

1291, 1302–1303.) That section "requires that a default judgment in a dissolution action which is greater than the amount specifically demanded in the petition be considered void as beyond the court's jurisdiction …." (*In re Marriage of Wells* (1988) 206 Cal.App.3d 1434, 1438.)

"A defendant has the right to elect not to answer the complaint. [Citation.] Although this may have been a tactical move by defendant, it is a permissible tactic. Defendant, relying on the absence of a statement of damages in the complaint, was entitled to have default entered against him. Section 580 'ensure[s] that a defendant who declines to contest an action … [is] not … subject[ed] … to open-ended liability' and operates as a limitation on the court's jurisdiction." (*Stein v. York* (2010) 181 Cal.App.4th 320, 325.) The limitation on default judgments under Code of Civil Procedure section 580 applies to other civil proceedings which use judicially approved pleading forms, most notably in the context of marital dissolutions. For example, in an action for marital dissolution, a court may not issue a default judgment imposing an obligation of child support where such relief was not requested in the petition for dissolution. (See, e.g., *Lippel, supra*, 51 Cal.3d at pp. 1167–1171.) "[T]he manner in which these boxes are checked, or not checked, informs and puts the respondent on notice of what specific relief the petitioner is, or is not, seeking." (*Id.* at p. 1170.) Similarly, in a marital dissolution proceeding in which one party defaults, a court cannot dispose of property not listed in the petition for dissolution. (See, e.g., *In re Marriage of Andresen* (1994) 28 Cal.App.4th 873, 879–880.)

Here, C.B. prepared and served appellant with a "Request for Domestic Violence Restraining Order," Judicial Council of California form DV-100. Line 21 of the form included a box to check if the applicant was requesting the court to order the person against whom the restraining order was being requested attend a 52-week batterer intervention program. C.B. did not check the box on line 21 of the form served on appellant. "[A] default judgment greater than the amount specifically demanded is void

as beyond the court's jurisdiction." (*Greenup v. Rodman* (1986) 42 Cal.3d 822, 826; *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1521.) "'[W]hen a judgment is vacated on the ground the damages awarded exceeded those pled, the appropriate action is to modify the judgment to the maximum amount warranted by the complaint.'" (*Van Sickle v. Gilbert*, *supra*, 196 Cal.App.4th at pp. 1521-1522.) Accordingly, the judgment is hereby modified to strike the portion of the order requiring appellant to attend the batterer intervention program.

DISPOSITION

The judgment is modified to strike the portion of the judgment requiring appellant attend a 52-week batterer intervention program. The judgment as modified, is otherwise affirmed. In the interests of justice, no costs are awarded on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)